RICHARD JASPER

Attorney at Law
276 FIFTH AVENUE
SUITE 501
NEW YORK, NEW YORK 10001
Phone (212) 689-3858
Fax (212) 689-0669

January 28, 2011

BY ECF & FACISIMILE (718) 613-2546
The Honorable Nicholas Garaufis
United States District Judge
United States District Court
Eastern District of New York
225 Cadman Plaza
Brooklyn, NY 11201

Re: United States v Vincent Basciano
05 CR 060 (S-11) (NGG)

Dear Judge Garaufis:

The defense respectfully requests that the following proposed questions be included in the jury questionnaire. The proposed questions (with potential variations) are designed to uncover specific forms of bias, in order to ascertain, if the juror can fairly consider mitigation and a sentence of life without the possibility of release, in accordance with the Court's instructions on the law.

Proposed Question 1

Variation A
Are your views on the death penalty such that you would find it difficult to consider a sentence of life without the possibility of release for someone who planned and premeditated an intentional murder and was found to be a future danger to others?
Please explain: ____

Variation B
Are your views on the death penalty such that you would be unable to consider a sentence of life without the possibility of release, if that person allegedly planned and premeditated an intentional murder and was found to be a future danger to others?
Please explain: ____

Variation C
Would the allegation that a person planned and premeditated an intentional murder, and was a future danger to others, affect your ability to be fair and impartial in considering the death penalty or life imprisonment?
Please explain: ____

Proposed Question 2

Variation A
Are your views on the death penalty such that you would find it difficult to consider a sentence of life without the possibility of release for someone who solicited the murder of a federal prosecutor and cooperating witnesses and was found to be a future danger to others?
Please explain: ____

Variation B
Are your views on the death penalty such that you would be unable to consider a sentence of life without the possibility of release, if that person allegedly sought the murder of a federal prosecutor and cooperating witnesses and was found to be a future danger to others?
Please explain: ____

Variation C
Would the allegation that a person sought the murder of a federal prosecutor and cooperating witnesses, and was a future danger to others, affect your ability to be fair and impartial in considering the death penalty or life imprisonment?
Please explain: ____

Proposed Question 3

What would be important to you in making the decision to choose between a sentence of the death penalty or life in prison without the possibility of release?
Please explain: ____

Proposed Question 4

Do you think that life without the possibility of release is adequate punishment for a person already serving a sentence of life imprisonment for a previous intentional murder?

We are mindful of the Court's previous ruling in Wilson, in which, the Court indicated "that there is no clear line of demarcation between a case-specific question that on its face is not a stake-out question, and a case-specific question that, albeit open-ended, begs follow-up questions that inevitably lead to stake-out questions." (Garaufis Memorandum & Order, United States v Wilson, 04 Cr 1016) at 5 (Docket Number 158)). However, we believe the proposed questions are distinguishable from those presented in Wilson, because they ask whether or not the prospective juror could fairly consider a life sentence. And, we contend that they fall into the category of questions, Your Honor deemed permissible, which are those "open-ended questions broadly querying the juror's thoughts about types of mitigation or aggravation evidence that might influence his or her decision on whether to impose the death penalty or life imprisonment without the possibility of release." (Garaufis Memorandum & Order, United States v Wilson, 04 Cr 1016) at 5 (Docket Number 158))

"Part of the guarantee of a defendant's right to an impartial jury is an adequate voir dire to identify unqualified jurors." Morgan, 504 U.S. at 729; see Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981); Dennis v. United States, 339 U.S. 162, 171-172 (1950); Morford v. United States, 339 U.S. 258, 259 (1950). An adequate voir dire enables a capital defendant to exercise his constitutional right to an impartial jury by challenging prospective jurors for cause before a judge able to accurately rule on their removal. See Morgan, 504 U.S. at 729-730; Mu'Min v. Virginia, 500 U.S. 415, 431 (1991). "[A] suitable inquiry is permissible in order to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried." Mu'Min, 500 U.S. at 431. Morgan clarifies that, in a capital case, questioning of potential capital jurors as to whether they would automatically or nearly always vote for the death penalty on the facts of the particular case, or could consider and give effect to the relevant mitigating factors in the case, is not only suitable, but constitutionally required if a capital defendant is to receive a voir dire adequate to protect his right to a trial before an impartial tribunal. Accordingly, the Sixth Amendment right of a capital defendant to adequate voir dire of potential jurors must include the right to inquire into a juror's ability to consider and give effect to any and all relevant aggravating and mitigating evidence in a particular case.

Therefore, as stated previously, we contend that the value of the proposed case specific questions is to ferret out specific forms bias on the part of the juror, as indicated in Your Honor's previous ruling in Wilson.

> I agree that certain case-specific questions can be appropriate in capital voir dire. Such questions may be proper, indeed necessary, if they deal with subject matter that would demonstrate impermissible bias on the part of a juror. See Fell, 372 F. Supp. 2d at 770 (suggesting that "a trial court should allow [case-specific] questions to be asked when they are reasonably directed toward discovering juror bias"). However, I also firmly believe that case-specific questioning cannot and should not be used to provide a roadmap to attorneys as to which mitigating or aggravating factors it should present or stress to the jury at the penalty phase of a capital prosecution. (Garaufis Memorandum & Order, United States v Wilson, 04 Cr 1016) at 5 (Docket Number 158))

In this case, the defendant must also be allowed to qualify jurors on not only mitigating factors, but aggravating factors, as well. Specifically, the real question is whether a juror can consider a sentence other than death for a defendant currently serving a life sentence, found to be a future danger, and confronted with the allegation that he solicited the murder of a federal prosecutor and several cooperating witnesses. To allow a juror whose beliefs would automatically compel a vote for death under such circumstances would be to permit the impermissible bias the Court specified in Wilson, and deny the defendant the right to a fair and impartial jury.

Respectfully submitted,

______/s/______________
George Goltzer
Richard Jasper
Ying Stafford
Attorneys for Vincent Basciano